Supreme Court, U.S.
FILED
NOV 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-772

In the Supreme Court of the United States

October Term, 1988

CARA LYN LANDRETH, a minor,
by and through her Guardian Ad Litem,
JOSEPH Y. ORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF
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CARA LYN LANDRETH

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PLAINTIFF(S)	CASE NUMBER
Cara Lyn Landeth et al.	CV 84-8618-LEW (GX)
vs	NOTICE OF ENTRY
USA	
DEFENDANT(S)	

TO THE ABOVE NAMED PARTIES AND THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that ORDER OF DISMISSAL SUMMARY JUDGMNT.

in the above entitled case was entered in the docket on 3-20-86.

CERTIFICATE OF MAILING

I, Clerk of the United States District Court, Central District of California, and not a party to the within action, hereby certify that on 3-20-86, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

H G Robert Fong
KY Wong & Fong
ste 300
643 So Olive St
LA Ca 90014

Shari K Silver AUSA

Blake Barnett
Milman & Bell
462 S Marengo Ave
Pasadena Calif, 91101

RECEIVED
MAR 21 1986
BY KU, WONG & FONG

CLERK, U S. DISTRICT COURT

By SUSAN HERNANDEZ
Deputy Clerk

B1 Ltr 7-25-88

FILED

SEP 23 1988

CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARA LYN LANDRETH, a minor, by and through her Guardian Ad Litem, JOSEPH Y. ORE, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee	CA No. 86-5732 DC No. CV-84-8618-LEW (Central California) ORDER

Before: FARRIS and REINHARDT, Circuit Judges, and McKIBBEN,* District Judge.

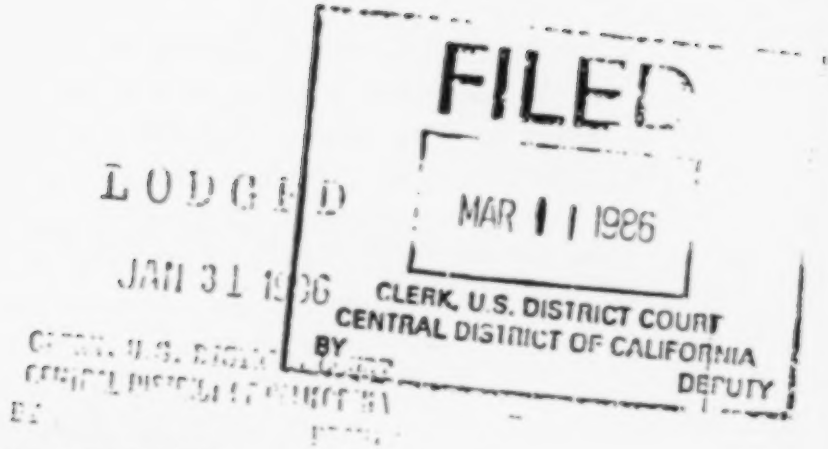
Judges Farris and McKibben have voted to deny the petition for rehearing; Judge Reinhardt has voted to grant the petition. Judges Farris and Reinhardt have voted to reject the suggestion for rehearing en banc and Judge McKibben recommends rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

*Honorable Howard D. McKibben, United States District Judge, District of Nevada, sitting by designation.



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Attorneys for Defendant

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CARA LYN LANDRETH, a minor by and through her Guardian Ad Litem, JOSEPH Y. ORE, Plaintiff, UNITED STATES OF AMERICA, Defendant.	NO. CV 84-8618 -LEW(Gx) PROPOSED ORDER OF DISMISSAL/ SUMMARY JUDGMENT

Defendant's motion to dismiss, or, in the alternative, motion for summary judgment, came on for hearing on January 6, 1986, at or about 9:00 a.m., before the Honorable Laughlin E. Waters, United States District Judge. In the case of *Jennie Landreth v. United States of America,* No. CV 85-4552-LEW(Gx), the plaintiff Jennie Landreth was represented by Garland Bell, and in the case of *Cara Lyn Landreth v. United States of America,* No. CV 84-8618-LEW(Gx), the plaintiff Cara Lyn Landreth was represented by Robert Fong. Defendant United States of America was represented by Robert C. Bonner, United States Attorney, by Shari K. Silver, Assistant United States Attorney, in both cases. The Court, having considered the pleadings herein and oral argument of counsel, and in accordance with the Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby entered in favor of defendant United States of America and against plaintiffs Jennie Landreth and Cara Lyn Landreth, a minor by and through her Guardian Ad Litem, Joseph Y. Ore, dismissing both actions and complaints in CV 84-8618-LEW(Gx) and CV 85-4542-LEW(Gx).

DATED: This 11 day of Mar, 1986.

LAUGHLIN E. WATERS

UNITED STATES DISTRICT JUDGE

PRESENTED BY:

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.

Assistant United States Attorney
Chief, Civil Division

Shari K. Silver

SHARI K. SILVER
Assistant United States Attorney

Attorneys for Defendant

CERTIFICATE OF SERVICE BY MAIL

I, Mary F. Moore, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of the United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on January 31, 1986, I deposited in the United States mails in the United States Courthouse at 312 North Spring Street, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of

Proposed Order of Dismissal/Summary Judgment

addressed to

Mr. H.G. Robert Fong
Ku, Wong & Fong
Olive Center, Suite 300
643 S. Olive St.
Los Angeles, CA. 90014

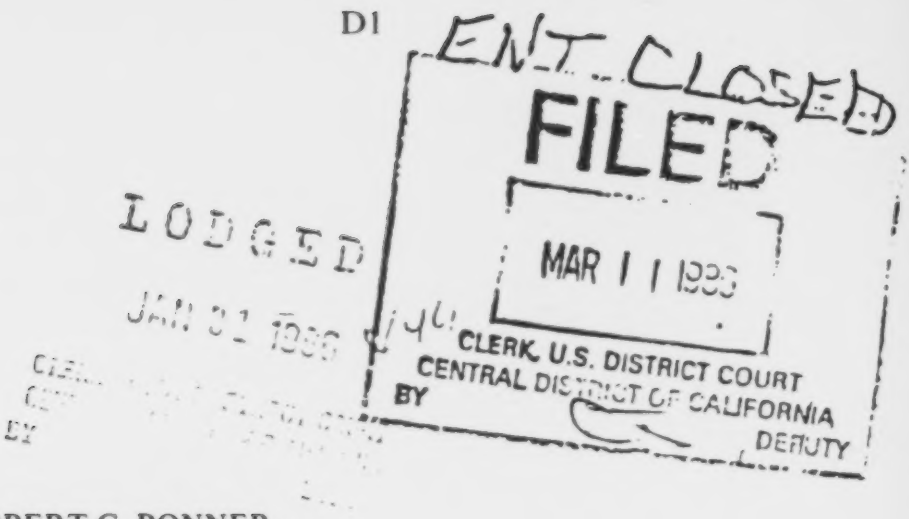
at his last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on January 31, 1986 at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct

Mary F. Moore

D1



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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CARA LYN LANDRETH, a minor by and through her Guardian Ad Litem, JOSEPH Y. ORE, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	NO. CV 84-8618 -LEW(Gx) ~~PROPOSED~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appendix D

Defendant's motion for dismissal/summary judgment in the cases of *Cara Lyn Landreth, a minor by and through her Guardian Ad Litem, Joseph Y. Ore, v. United States of America,* No. CV 84-8618-LEW(Gx), and *Jennie Landreth v. United States of America,* No. CV 85-4542-LEW(Gx), came on for hearing on January 6, 1986 at 9:00 a.m., before the Honorable Laughlin E. Waters, United States District Judge. Plaintiff Cara Lyn Landreth was represented by her attorney, Robert Fong; plaintiff Jennie Landreth was represented by her attorney, Garland Bell, and defendant United States of America was represented by its attorneys of record, Robert C. Bonner, United States Attorney, by Shari K. Silver, Assistant United States Attorney.

The Court having considered the briefs and memoranda filed by the parties and having considered the oral argument of counsel and being fully advised in the premises, makes the following findings and conclusions of law.

1. Plaintiff Jennie Landreth's administrative tort claim is dated March 1, 1985 and seeks damages against the United States as a result of the negligence (medical malpractice) of Air Force physicians/personnel at Plattsburgh Air Force Base Medical Center, New York, on March 30, 1973 at 10:30 a.m., when she took her daughter, Cara Lyn Landreth, for treatment as a result of Cara's ingestion of Jennie's asthma medication, quibron, when Cara was 11 months old. Plaintiff seeks damages against the United States of America under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671 *et seq.*

2. Cara Lyn's administrative tort claim is dated September 6, 1983, and seeks damages against the United

States as a result of negligence (medical malpractice) of Air Force physicians/personnel at Plattsburgh Air Force Base Medical Center, New York, on March 30, 1973 at 10:30 a.m., when she took her daughter, Cara Lyn Landreth, for treatment as a result of Cara's ingestion of Jennie's asthma medication, quibron, when Cara was 11 months old. Plaintiff seeks damages against the United States of America under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671 *et seq.*

3. On the morning of March 30, 1973, Jennie Landreth was packing household items preparing for her and her family's move from Plattsburgh, New York, to California. At about 10:15 a.m., she discovered her daughter, Cara Lyn, with pills in her hand, sitting on the floor of her parents' bedroom. She and her husband, William Terry Landreth, left their home at or about 10:30 a.m. and took Cara to the emergency room at the Plattsburgh Air Force Base Hospital, which was 7 to 10 miles from their house. When she reached the hospital, she told the paramedics that Cara had swallowed some quibron.

4. Viewing the evidence in a light most favorable to the plaintiffs, the Court finds that Jennie spoke with the orderly and could not tell him how many tablets were in the bottle. She told the orderly that Cara did not look fine, to look at her eyes. She says the orderly told her, "well, just a minute and we'll get a doctor to check her." Thereon, the orderly slipped out of the room into the hall and talked to a doctor and she heard the doctor say, "give her 15 cc. of ipecac and send her home." (Deposition of Jennie Landreth, pp. 28-31). Mrs. Landreth testified that a physician never examined Cara Lyn. *Id.*

5. Mrs. Landreth testified that 15 to 20 minutes transpired between the time she heard the doctor say

to the orderly to give Cara the syrup of ipecac and the time when the syrup of ipecac was given to Cara. She asked the orderly to have a doctor examine Cara and said that the orderly told the doctor that the parents wanted a physician to examine Cara. When she asked to have a doctor examine her child, the orderly said no, that the doctor said he had to go get his car fixed. At that time, she though it was unusual that a physician said he had to get his car fixed instead of examining her daughter. (*Id.* 35).

6. Mrs. Landreth returned home and during the day she does remember Cara throwing up. At about 6:45 p.m., she noticed Cara's change in behavior. Her eyes appeared to roll back and she started convulsing. At the time that Cara Lyn was convulsing, Mrs. Landreth knew that Cara had a problem. She and her husband again took Cara Lyn to Plattsburgh emergency room between 6:45 and 7:00 p.m. After being treated there, she gave her consent to have Cara transferred for further treatment to Montreal Children's Hospital, 64 miles away. She arrived at Montreal Children's Hospital at 12:00 or 1:00 a.m. in the morning, wherein Cara remained hospitalized for six days. The physicians at Montreal Children's Hospital told Jennie that Cara was having seizures because of the quibron ingestion. The physicians at Montreal Children's Hospital told her to follow up with the physicians at Plattsburgh, and upon discharge was given a letter to give to subsequent doctors who were to treat Cara in the future. She told the physicians at Montreal Children's Hospital that her daughter did not know her and that she was acting unusual. At that point, she knew that "something was wrong." (Id. 61).

7. Mrs. Landreth testified that she noticed changes in Cara's behavior when Cara was 15 months old. Cara got very angry and had many temper tantrums. She

became aware of the seizures when she went to see Dr. Gabriel, but cannot remember the year. (*Id.* 60-66). When Jennie suspected something was wrong with Cara at 15 months, she took her to the base doctor in the Philippines where her husband was stationed and they recommended that she take Cara to someone like a behavior specialist, counselor-type doctor. (*Id.*, 61). Mrs. Landreth testified that she first saw Cara experience a seizure when she knew what she was looking for when Cara was hospitalized at the UCLA Neuropsychiatric Institute for the first time sometime between 1977-1979. She told both Dr. Greenwald and Dr. Gabriel that she felt that at 18 months Cara was not developing rapidly enough with her communications skills. She told both doctors that Cara had ingested quibron in March of 1973 and had extreme temper tantrums. In 1979 she filed a petition with the Juvenile Court to have Cara placed in a home because Cara was having behavioral problems, emotional, educational, and other physical problems. She also told Dr. Lillian Lessor at UCLA Neuropsychiatric Ward in 1979 that Cara had ingested quibron at 11 months, and that Cara's problems were partially related to the quibron ingestion because she had behavior problems after the ingestion.

8. William Terry Landreth, the father of Cara Lyn, and former husband of Jennie, testified that the two orderlies who treated Cara at the Plattsburgh Air Force Base Hospital in New York on March 30, 1973, gave Cara a solution, something to make her throw up and contemplated pumping her stomach. At the time that he took Cara there, he thought it was unusual that Cara was not seen by a physician and he thought it was unusual that the physician on duty was not there. When they returned to the hospital that evening with Cara the second time, he knew something was serious. He told

the doctor during the second visit to the emergency room that Cara had not seen a doctor in the morning. Mr. Landreth thought it was very unusual that the doctor had left. He remembers a Staff Sergeant at the hospital saying that the doctor was attending to his car and was shocked at that statement. (Deposition of Terry Landreth, pp. 23-31, 64).

9. William Terry Landreth testified that Jennie and himself thought it strange that Cara was not seen by a doctor in the morning. At Montreal Children's Hospital, he told a physician there that Cara had not seen a doctor in the emergency room and was very upset at this point. (*Id.* 36-37). Someone told him at Montreal Children's Hospital that the physicians at Plattsburgh Air Force Base should have pumped Cara Lyn's stomach. His wife was aware of that conversation as they discussed this fact that they should have pumped Cara's stomach. (*Id.* 40). Mr. Landreth testified that he discussed the failure of the Air Force to pump Cara Lyn's stomach several times with his wife for years after that. He is sure that the conversations between himself and his wife occurred within two years of March 30, 1973. A doctor in Century City, Dr. Gabriel, performed a brain scan on Cara and determined that she had brain damage as a result of the ingestion of quibron. This was in 1977 and 1978 when he found out that something was permanently wrong with Cara Lyn. He is sure that his wife, Jennie, said something to the effect to him, "if only the Air Force had pumped her stomach," sometime before 1979. (*Id.* 45). He noticed changes in Cara Lyn's behavior when she was 18 months to 2 years old. He was concerned with her temper tantrums, her throwing back her body, pulling out her hair, screaming, scratching and biting. In 1974 when he was in the

Philippines, both he and his wife thought that Cara's behavior was not proper.

10. Cara's father stated that in 1978 or 1979, Jennie told him that she always felt it was the Air Force's fault for there not being a doctor there and for them not pumping her stomach. (*Id.* 72-73). This statement was made frequently during their conversations, at least six times between 1978-1979.

11. Cara's father stated that Jennie told him that Cara's problems were partly her fault and were also caused by the Air Force. Both Jennie and William Terry told people at the Neuropsychiatric Institute at UCLA, when Cara was hospitalized, that they were upset that the Air Force did not pump Cara's stomach. William Terry remembers telling Jennie's parents sometime before 1977 that the Air Force had not pumped Cara's stomach. (Id. 74-83).

12. There are no material issues of fact requiring trial on the statute of limitations issue.

CONCLUSIONS OF LAW

1. William and Jennie Landreth knew of the causes of Cara's disabilities as early as 1973. Giving every benefit of the doubt to them, they knew the causes of Cara's disabilities by 1979.

2. Cara Lyn's guardian was not reasonably diligent in filing her administrative tort claim which is dated September 6, 1983, when Jennie and William Terry Landreth knew of the causes of Cara's disabilities as early as 1973, or by at least 1979.

3. Jennie Landreth was not reasonably diligent in filing her administrative tort claim dated March 1, 1985.

BEST AVAILABLE COPY

Plaintiff Jennie Landreth and plaintiff Cara Lyn Landreth knew or should have known of the injury and cause by at least 1979 and their administrative tort claims are untimely. *United States*

CONCLUSIONS OF LAW

1. For purposes of determining the accrual date of Cara Lyn's claim, the knowledge of her parents is imputed to her. *Fernandez v. United States*, 673 F.2d 269 (9th Cir. 1982).

2. According to the uncontradicted deposition testimony of William Terry Landreth, Cara Lyn's father, Jennie Landreth made statements as early as 1975 placing blame for Cara Lyn's injury on the Air Force. Under the most generous reading of the facts Jennie and William Landreth knew that the acts or omissions of the Air Force may have caused Cara Lyn's injuries by at least 1979.

3. Therefore, "plaintiff discovered or through the exercise of reasonable diligence should have discovered that the failure of [the] doctors to diagnose, treat or warn . . . led to" Cara Lyn's injuries. *Augustine v. United States*, 704 F.2d 1074 (9th Cir. 1983).

4. Because plaintiff Jennie Landreth and plaintiff Cara Lyn Landreth knew or should have known of the injury and its cause by at least 1979, their administrative tort claims are untimely. *United States v. Kubrick*, 444 U.S. 111 (1970); *Dyniewiecz v. United States*, 742 F.2d 484 (9th Cir. 1984); *Davis v. United States*, 642 F.2d 328 (9th Cir. 1981); 28 U.S.C. § 2401(b).

5. This Court therefore lacks subject matter jurisdiction over this action. The action is dismissed with prejudice. Costs are awarded to the prevailing party, defendant United States of America.

BEST AVAIL

DATED: May 11, 1986

Laughlin E. Waters
United States District Judge

ABLE COPY

CERTIFICATE OF SERVICE BY MAIL

I, Mary F. Moore, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of the United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to to the adove-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on January 31, 1986, I deposited in the United States mails in the United States Courthouse at 312 North Spring Street, Los Angeles, California, in the above-entitled action, in an envelop bearing the requisite postage, a copy of

Proposed Findings of Fact and Conclusions of Law

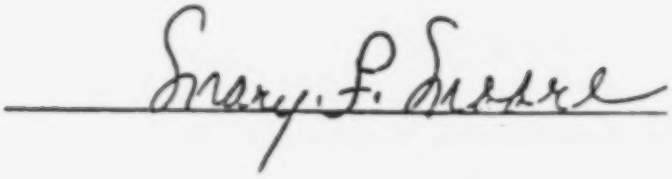
addressed to

Mr. H.G. Robert Fong
Ku, Wong & Fong
Olive Center, Suite 300
643 S. Olive St.
Los Angeles, CA. 90014

at his last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on January 31, 1986 at Los Angeles, California.

I certify under penalty of perjury that the foregc
is true and correct.



PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 11, 1988, I served the within *Supplemental Appendix to the Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
Attention: Loretta Ruffin
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Solicitor General
Department of Justice
Washington, D.C. 20543

Robert C. Bonner
United States Attorney
Shari K. Silver
Assistant United States Attorney
1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 11, 1988, at Los Angeles, California.

Betty J. Malloy
(Original signed)